U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date JAN 1 4 2014 Office: LOS ANGELES, CA [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application to Register Permanent Residence or Adjust Status Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF APPLICANT: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron M. Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The application to adjust status was denied by the Field Office Director (director), Los Angeles, California. The Administrative Appeals Office (AAO) rejected a subsequently filed appeal because the appeal was untimely and the AAO had no jurisdiction to adjudicate the appeal from the denial of an application to adjust status under section 245 of the Immigration and Nationality Act (the Act). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed.

The record reflects that the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, a Form I-601, Application for Waiver of Grounds of Inadmissibility, and a Form I-212, an Application for Permission to Reapply for Admission into the United States after Deportation or Removal. The director denied the Form I-485, the Form I-601, and the Form I-212. The applicant submitted a Notice of Appeal or Motion (Form I-290B), indicating at Part 2 that he was filing an appeal of the Form I-485 denial; however, the applicant indicated at Part 3 that he was filing an appeal and a motion to reopen and reconsider the director's decision of the Form I-485 and the Form I-212. The applicant provided the date of denial as July 30, 2009, which was the date of denial of the Form I-212 application. The AAO accepted the Form I-290B as it relates to the appeal of the Form I-485, and on October 22, 2012, rejected the Form I-290B because it was untimely filed and the AAO had no jurisdiction to review an appeal from the denial of an application to adjust status under section 245 of the Act. The applicant has filed the current Form I-290B, Notice of Appeal or Motion requesting the AAO to reopen and reconsider its decision of October 22, 2012.

On motion, the applicant asserts that he is eligible to adjust status through his U.S. citizen father and that he is eligible for a waiver of inadmissibility based on humanitarian grounds, family unity and health reasons. The applicant requests that the AAO favorably review his application because a denial will result in extreme hardship to his father.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must be "[a]ccompained by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet the applicable requirements shall be dismissed. In this case, the applicant failed to submit a statement regarding whether the validity of the AAO's decision has been, or is, subject of any judicial proceeding. The regulation mandates that this shortcoming alone requires USCIS to dismiss the motions. *See* 8 C.F.R. § 103.5(a)(4).

Notwithstanding the fatal defect noted above, the regulation requires that a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. See *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano,* 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal argument" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. Also, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Matter of O-S-G-,* 24 I&N Dec. 56, 58 (BIA 2006). Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60. Furthermore, a motion to reconsider is not a process by which a party may submit documents, which were previously available and the party failed to submit them when requested to do so.

The present motion to reconsider does not allege that the issues, as raised on appeal, involved the application of precedent or a novel situation, or that there is a new precedent or a change in law that affects the AAO's recent decision.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1] In this matter, the applicant has presented no new facts; rather, the applicant resubmits the same facts previously submitted on appeal.

Further, the AAO finds that it does not have jurisdiction over a motion to reconsider filed on a rejected appeal. The regulation at 8 C.F.R. § 103.5(a)(1)(ii) provides that the "official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction." In this case, the appeal was rejected by the AAO on October 22, 2012, as untimely filed and the AAO's lack of jurisdiction over the Form I-485 appeal without considering the merits of the appeal; accordingly, "the latest decision" in this matter is the denial by the director, Los Angeles, California Field Office dated March 18, 2009, not the rejection notice. Thus, the AAO is not "the official who made the latest decision in the proceeding," and does not have jurisdiction under 8 C.F.R. § 103.5(a)(1)(ii). Accordingly, the motion must be dismissed for this reason also.

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion to reopen and to reconsider does not meet the applicable filing requirements, it must be dismissed.

ORDER: The motion is dismissed. The previous decision of the AAO remains undisturbed.

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[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).